Filed February 9, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-9007

HENRY FAHY,

v.

MARTIN HORN, COMMISSIONER, PENNSYLV ANIA DEPARTMENT OF CORRECTIONS; CONNER BLAINE, JR., SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT GREENE, AND; JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT OF THE STA TE CORRECTIONAL INSTITUTION AT ROCKVIEW,

Martin Horn;
Conner Blaine, Jr.;
Joseph P. Mazurkiewicz, Appellants.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. No. 99-cv-05086)
District Judge: The Honorable Norma L. Shapir o

ARGUED JULY 19, 2000

BEFORE: NYGAARD, McKEE, and STAPLETON,
Circuit Judges.

(Filed: February 9, 2001)

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OPINION OF THE COURT

NYGAARD, Circuit Judge.

The appellants in this capital case are Martin Horn, the Commissioner of the Pennsylvania Department of Corrections, Conner Blaine, Jr., the Superintendent of the State Correctional Institution at Greene, and Joseph P. Mazurkiewicz, the Superintendent of the State Corr ectional Institution at Rockview. We refer to these parties collectively as "the Commonwealth."

Appellee Henry Fahy was convicted of first degr ee murder in 1983 and sentenced to death. Fahy first appealed his conviction directly to the Pennsylvania Supr eme Court, which affirmed the conviction and judgment of sentence. Fahy then filed a petition under Pennsylvania's Post Conviction Hearing Act, 42 Pa. Const. Stat. § 9541 (superceded and replaced by the Post Conviction Relief Act ("PCRA") in 1988), but he did not pursue this petition and it was dismissed.

In 1992, the Governor of Pennsylvania issued Fahy's death warrant. Fahy obtained a stay of execution fr om the Pennsylvania Supreme Court, which remanded the case to the Philadelphia Court of Common Pleas to consider

whether trial counsel had been ineffective. The Court of Common Pleas rejected Fahy's claim after an evidentiary hearing, and the Pennsylvania Supreme Court upheld this decision.

The Governor then signed another death warrant. Fahy again obtained a stay from the Pennsylvania Supreme Court and filed a third state petition for collateral review. In this petition, Fahy claimed that he suffer ed from mental illness, that there should have been a competency examination before the penalty phase, and that his illness should have been a mitigating factor in his sentencing.

At this time, Fahy also requested a stay andfiled a habeas petition in the United States District Court of the Eastern District of Pennsylvania, which was dismissed without prejudice for failure to exhaust state remedies. The District Court entered this order because the Pennsylvania Supreme Court had already entered a stay of execution.

The state PCRA court again denied relief after a hearing. Fahy appealed to the Pennsylvania Supreme Court, but then requested that this appeal be withdrawn. Fahy, represented by counsel, stated that he wished to waive all remaining appeals and collateral proceedings so that he could be promptly executed. The Pennsylvania Supreme Court remanded to determine whether Fahy fully understood the consequences of his request. Fahy appeared before the PCRA court where he requested and was granted one additional week to consider his request. In addition, Fahy was transferred to a different correctional institution to avoid alleged harassment from a guar d. Fahy later affirmed his desire to waive his appeal and any remaining collateral relief. The Pennsylvania Supr eme Court upheld this waiver.

On November 12, 1997, Fahy's counsel filed a fourth petition for state collateral relief. The PCRA court dismissed this petition because of its failure to set forth a prima facie case that a miscarriage of justice had occurr ed and because it was time-barred. The Pennsylvania Supr eme Court affirmed, noting that the petition was untimely and that the court lacked jurisdiction to review it.

The Governor then issued another warrant of execution for Fahy, scheduling his execution for October 19, 1999. On October 13, 1999, Fahy's counsel filed a motion for stay of execution and an amended habeas petition in the District Court. On October 14, 1999, the District Court stayed the execution for a period of 120 days. The District Court further determined that the amended petition should be treated as a first, and not a successive, habeas petition because the first application was dismissed without prejudice.

The Commonwealth argued that the amended habeas petition was untimely, but the District Court concluded that it was not time barred because both statutory and equitable tolling applied. Chief Judge Giles1 stated that his decision would be subject to modification by Judge Shapiro, who would consider the matter within thirty-five days from the date of his order. Judge Shapiro extended the stay to allow the parties to brief the substantive issues of the petition. After considering the matter, Judge Shapiro agreed that Fahy's amended habeas petition was properly filed. The Commonwealth appeals this deter mination. We will affirm.

I. Statutory Tolling

Three provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") ar e relevant to Fahy's habeas petition. First, the AEDPA sets a statute of limitations period of one year to apply for a writ of habeas corpus challenging state court action. See 28 U.S.C. § 2244(d)(1); Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999). This period begins running from "the date on which the judgment became final by the conclusion of dir ect review or the expiration of the time for seeking such r eview." Id. However, the statute of limitations may be statutorily tolled during "[t]he time during which a pr operly filed application for State post-conviction relief or other collateral review

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1. Under the Eastern District's procedures this matter would have been assigned to Judge Shapiro because she r eviewed the initial habeas petition, but the case was assigned to Chief Judge Giles because Judge Shapiro was unavailable at that time.

with respect to the pertinent judgment or claim is pending." Id. (emphasis added). Second, § 2254 r equires petitioners to exhaust their state court remedies "unless there is an absence of available corrective state pr ocess or state remedies are ineffective." Morris, 187 F.3d at 337; see also Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198 (1982); 28 U.S.C. § 2254(b)(1). Third, the AEDP A "severely limits the extent to which a federal habeas petitioner canfile a `second or successive' habeas petition." Morris, 187 F.3d at 338; see also 28 U.S.C. § 2244(b). The AEDPA statute of limitations can only be statutorily tolled when a collateral petition for state relief was "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Morris, 187 F.3d at 338 (quoting Lovasz v. Vaughn, 134 F .3d 146, 148 (3d Cir. 1998)). Thus, in the AEDPA Congress set forth the requirement that only a properly filed petition for state collateral relief can toll the statute of limitations for filing a federal habeas petition, and in Lovasz, 134 F.3d at 146, we defined "properly filed" as being submitted in accordance with the state's procedural requir ements. State petitioners therefore must file their state claims promptly and properly under state law in order to preserve their right to litigate constitutional claims that are more than one year old in federal court. As the Ninth Circuit has stated,"[h]ad Congress intended to toll the statute of limitations for the period during which even improper applications were pending in state court, it would not have included the `properly filed' limitation." Dictado v. Ducharme, 189 F.3d 889, 892 (9th Cir. 1999).

Fahy argues that we must decide whether his state PCRA petition was "properly filed" as a matter of federal law and that the state court's determination of this issue is not binding on us. Fahy is correct that in applying a federal statute we must construe its terms as a matter of federal law. However, the AEDPA explicitly dir ects us to toll the statute of limitations only when a collateral petition for state relief was "submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Morris, 187 F.3d at 338. Therefore, to apply this statute as a matter of federal law we must look to state law governing when a petition for collateral

relief is properly filed. The AEDP A requires us to interpret state law as we do when sitting in diversity cases, and we therefore must defer to a state's highest court when it rules on an issue. Here the Pennsylvania Supr eme Court has specifically ruled that Fahy's PCRA petition was not properly filed as a matter of state law. As a result, because final judgment in Fahy's case occurred on October 21, 1986, before the new habeas statute became ef fective on April 24, 1996, Fahy had one year from the statute's effective date to file his habeas petition. See Burns v. Morton, 134 F.3d 109, 111 (3d Cir . 1998). The one year filing deadline thus expired well befor e Fahy filed his habeas petition in 1999. Fahy's petition was ther efore not statutorily tolled because his PCRA petition was not properly filed.

II. Equitable Tolling

Fahy delayed filing his federal habeas petition because he believed he was required to pursue a fourth petition for collateral relief in state court. At the time Fahy made this ill-advised choice, he reasonably believed that the state petition was properly filed. The Pennsylvania Supreme Court eventually disagreed, but the filing period for Fahy's federal habeas petition had run by the time the Court ruled. Fahy claims, and the District Court ruled, that the statute of limitations for filing his habeas petition should have been tolled to allow him to determine if he could maintain his state petition.

We have explained that the one year filing deadline contained in 28 U.S.C. § 2244(d)(1) can be subject to equitable tolling

> only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented fr om asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing [the] claims. Mere excusable neglect is not sufficient.

Miller v. New Jersey Dept. of Corr., 145 F.3d 616, 618 (3d Cir. 1998). We later enumerated thr ee circumstances permitting equitable tolling:

> if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum.

Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted).

In non-capital cases, attorney error , miscalculation, inadequate research, or other mistakes have not been found to rise to the "extraordinary" cir cumstances required for equitable tolling. See Freeman v. Page, 208 F.3d 572 (7th Cir. 2000) (finding no basis for equitable tolling where the statute of limitations was changed to shorten the time for filing a PCRA only four months prior to thefiling of the petition); Taliani v. Chrans, 189 F .3d 597 (9th Cir. 1999) (finding lawyer's inadequate research, which led to miscalculating the deadline, did not warrant equitable tolling); Seitzinger v. Reading Hosp. and Medical Ctr., 165 F.3d 236 (3d Cir. 1997) (finding that an attorney's deception, which caused a prisoner to miss the habeas filing deadline, merits equitable tolling); Doherty v. Teamsters Pension Trust Fund of Phila. & Vicinity, 16 F.3d 1386 (3d Cir. 1994) (allowing time to toll because of the death of the petitioner's attorney). As the Supreme Court has repeatedly stated, however, "death is different." See Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985) ("[T]he qualitative differ ence of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Gardner v. Florida, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would

make the rigid application of a limitation period unfair" and whether the petitioner has "exercised r easonable diligence in investigating and bringing [the] claims." Miller, 145 F.3d at 618.

If the limitation period is not tolled in this case, Fahy will be denied all federal review of his claims. Her e the penalty is death, and courts must consider the ever-changing complexities of the relevant provisions Fahy attempted to navigate. Because the consequences are so grave and the applicable law is so confounding and unsettled, we must allow less than "extraordinary" cir cumstances to trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair . The subsequent question, therefore, is whether Fahy diligently and reasonably asserted his claims.

First, at the time Fahy filed his fourth PCRA petition Pennsylvania law was unclear on the operation of the new PCRA time limit. The Pennsylvania courts could have accepted Fahy's petition as timely because of its r ole within the capital case, see Banks v. Horn, 126 F.3d 206 (3d Cir. 1997), or could have found the government interference exception applicable. See Commonwealth v. Lark , 560 Pa. 487, 476 A.2d 585 (2000). The law at the time of Fahy's petition was inhibitively opaque. Fahy filed his fourth PCRA petition in November, 1997, months befor e the Pennsylvania Supreme Court announced that it would no longer observe the relaxed waiver rule in Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998). Further, the Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 in Commonwealth v. Banks, 556 Pa. 1, 726 A.2d 374 (1999). In Banks, 126 F.3d at 214, we rejected the Commonwealth's claim that a PCRA petition would be time-barred and required Banks to r eturn to state court because we could not confidently determine that the state court would not apply the relaxed waiver rule it had applied in previous capital cases. If we could not pr edict how the Pennsylvania court would rule on this matter , then surely we should not demand such foresight from the petitioner. Fahy's misjudgment, therefore, was r easonable.

Second, it was also objectively reasonable for Fahy to believe that if he filed a § 2254 petition at the time he filed his fourth PCRA petition, the § 2254 petition would be dismissed as unexhausted. As we stated in Banks , at the relevant time we could not, "with confidence," predict the Pennsylvania court's position regarding pr ocedural bars on unexhausted claims. Banks, 126 F.3d at 214. In light of this uncertainty, the changes wrought by the AEDPA, and our strong opinions regarding exhaustion, it was reasonable for Fahy to believe that a fourth petition was necessary.

If we refuse to equitably toll the statute, then we would deny this capital defendant federal review of his claims. Fahy diligently asserted his claims and the strategic choices he made during the appeal process were r easonable. When state law is unclear regarding the operation of a procedural filing requirement, the petitioner files in state court because of his or her reasonable belief that a § 2254 petition would be dismissed as unexhausted, and the state petition is ultimately denied on these grounds, then it would be unfair not to toll the statute of limitations during the pendency of that state petition up to the highest reviewing state court. We will therefore equitably toll the AEDPA's statute of limitations. We elect to exercise this leniency under the facts of this capital cases where there is no evidence of abuse of the process.

We therefore affirm the or der of the District Court, albeit on equitable tolling grounds and not on statutory tolling grounds.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit